

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 382
5643262

BETWEEN JASBIR BALBIR SINGH
 Applicant

AND AUCKLAND DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Rebecca Rendle, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 22 November 2016

DETERMINATION OF THE AUTHORITY

A. The Authority lacks jurisdiction to investigate Jasbir Balbir Singh's personal grievance application because, at the time of lodging her application, she had already commenced proceedings for a complaint under the Human Rights Act 1993: section 112(4) of the Employment Relations Act 2000 applied.

B. Costs are reserved.

Employment Relationship Problem

[1] On 3 October 2016 Jasbir Balbir Singh lodged a statement of problem claiming she was subject to workplace bullying, harassment, social isolation and breaches of her privacy while she worked for the Auckland District Health Board (ADHB) from December 2013 to February 2015. She worked as a registrar. She said she felt discriminated against because other registrars were granted leave for various purposes but she was told to resign after she had applied, four times, for three months' unpaid leave. She sought the leave for health reasons.

[2] By statement in reply lodged on 17 October 2016 ADHB said Ms Singh had already elected to pursue a complaint under the Human Rights Act 1993 (the HR Act). Ms Singh made her complaint to the Human Rights Commission on 18 November 2015 and filed a statement of claim in the Human Rights Review Tribunal (the Tribunal) on 2 February 2016. Her statement of claim was served on ADHB on 22 April 2016.

[3] ADHB said Ms Singh's election to pursue her concerns under the procedures of the HR Act meant s 112 of the Employment Relations Act (the ER Act) applied, with the result that the Employment Relations Authority (the Authority) had no jurisdiction to investigate her personal grievance application:

112 Choice of procedures

- (1) Where the circumstances giving rise to a personal grievance by an employee are also such that that employee would be entitled to make a complaint under the Human Rights Act 1993, the employee may take 1, but not both, of the following steps:
 - (a) the employee may, if the grievance is not otherwise resolved, apply to the Authority for the resolution of the grievance
 - (b) the employee may make, in relation to those circumstances, a complaint under the Human Rights Act 1993
- (2) For the purposes of subsection (1)(b), an employee makes a complaint when proceedings in relation to that complaint are commenced by the complainant or the Commission.
- (3) If an employee applies to the Authority for a resolution of the grievance under subsection (1)(a), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the grievance that the employee may have under the Human Rights Act 1993.
- (4) If an employee makes a complaint under subsection (1)(b), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Act.

[4] The HR Act, at s 79A, has an equivalent provision to the same effect.

[5] ADHB's reply said there was another impediment to Ms Singh's application to the Authority going ahead but that issue need only be addressed if its view regarding the effect of the choice of procedures was not correct. ADHB said Ms Singh had not raised any personal grievance within the 90 day statutory timeframe. Because of the conclusion reached in this determination regarding jurisdiction, it was not necessary to resolve the 90 day issue.

Investigation of the jurisdiction issue

[6] The question of jurisdiction was determined ‘on the papers’.¹ Ms Singh had an opportunity to lodge a submission, which she did by letter on 24 October 2016. ADHB then lodged its submission in reply on 3 November 2016. Ms Singh responded with a further letter on 4 November 2016. Those submissions have been considered in reaching the conclusion stated in this determination but have not been set out in full.²

Ms Singh’s position

[7] Ms Singh confirmed she had commenced proceedings in the Tribunal. She said those proceedings were “regarding bullying, discrimination against nationality and the assumption of a disability and harassment while I worked at the ADHB”. She wanted that case to continue because the Tribunal and the HR Act “would be the most suitable system to handle that case”. She said her application to the Authority dealt with different matters, involving “social isolation and bullying”. She said this included reporting her to the Medical Council, inappropriately involving her spouse in workplace issues, and breaching her privacy. She said those matters were beyond the Tribunal’s jurisdiction.

[8] She denied ADHB’s allegation she was “double dipping” by seeking to pursue her concerns in two jurisdictions. However, if the Authority deemed her case in the Tribunal was similar to the case lodged in the Authority, Ms Singh confirmed she would prefer to follow the process through the Tribunal under the HR Act.

ADHB’s analysis

[9] ADHB submitted that the subject matter of the proceedings before the Tribunal and the Authority were the same so Ms Singh was now precluded from pursuing her claim in the Authority.

[10] It set out a comparison of the allegations made in her statement of claim in the Tribunal and her statement of problem to the Authority. Without setting out those details in full, I agree the alleged factual circumstances on which Ms Singh founded

¹ Employment Relations Act 2000, s 174D.

² Employment Relations Act 2000, s 174E.

her personal grievance application to the Authority were essentially the same as those set out in her statement of claim under the HR Act.

[11] Section 112 of the ER Act required Ms Singh to make a choice between the procedures she wished to follow to have her concerns about those alleged circumstances addressed. It identifies the choice to follow the HR Act procedure as having been made when an employee (which includes a former employee such as Ms Singh) commences “proceedings” about a complaint under the HR Act. Ms Singh commenced such proceedings when she lodged her statement of claim with the Tribunal on 2 February 2016, more than seven months before her application to the Authority. The limitation stated in s 112(4) of the ER Act had to be applied to that situation. Having made a complaint under the HR Act by commencing proceedings in the Tribunal, Ms Singh may not exercise any rights under the ER Act in relation to the subject matter of her complaint.

[12] As explained by the Employment Court in its decision in *Wang v Hamilton Multicultural Services Trust* the commencement of such proceedings is a point of “irrevocability”.³ It is a “fork in the road at which is found the ‘no U turn’ sign”.⁴

[13] ADHB’s submissions disclosed that it was seeking to have Ms Singh’s claim under the HR Act ‘struck out’ by the Tribunal. It submitted that if it were successful in having some or all of Ms Singh’s claims struck out by the Tribunal, such an outcome had no bearing on the question of jurisdiction of the Authority. Its submission was correct. As explained by the Court in the *Wang* case, section 112 “operated to preclude an unsuccessful applicant in one jurisdiction then having an opportunity to try again”.⁵ Having made her choice to begin in the Tribunal, s 112 would prevent Ms Singh making a ‘U turn’ and coming back to try again in the Authority.

Outcome

[14] The result of Ms Singh’s irrevocable election under s 112 of the ER Act was that the Authority lacked jurisdiction to investigate her personal grievance application because the subject matter of her complaint was to be considered by the Tribunal

³ [2009] ERNZ 322 at [10].

⁴ *Wang*, above n 3, at [15].

⁵ *Wang*, above n 3, at [13].

under the HR Act. Accordingly Ms Singh's application had to be dismissed without further investigation.

Costs

[15] ADHB sought to be heard on costs in respect of the jurisdictional issue. Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority